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SUPREME COURT OF THE UNITED STATES

No. 383

OCTOBER TERM, 1955

GENERAL BOX COMPANY,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

FRED G. BENTON,
Baton Rouge, La.

CARL C. CHADWICK,
Natchez, Miss.

BARNETT, JONES & MONTGOMERY,
Jackson, Miss.
Attorneys for Plaintiff-Petitioner

Franklin Press, Inc. Baton Rouge, La.

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the District Court denying the government's motion to dismiss (R. 60-63) is reported at 94 F. Supp. 441. The Court's opinion after the first trial (R. 318-337) is

reported at 107 F. Supp. 981. The final opinion of the Trial Court following a new trial (R. 343-351) is reported at 119 F. Supp. 749. The opinion of the Court of Appeals (R. 367-394) is reported at ____ Fed. (2d) _____.*

JURISDICTION

The original date of the judgment sought to be reversed is June 17, 1955. A petition for rehearing was filed July 7, 1955, within the time provided for by the rules of the United States Court of Appeals, Fifth Circuit (R. 396-404), and the petition was denied (Circuit Judge Cameron dissenting) on August 5, 1955. (R. 405) This court has jurisdiction to consider and grant this petition pursuant to Title 28, USCA Section 1254(1).

QUESTIONS PRESENTED

The question here presented to the Court was stated by Circuit Justice Cameron in a dissenting opinion in the Court below in the following terms:

> "Can the United States Goverment, without just compensation confiscate and destroy for its own monetary gain, the valuable timber of appellee growing on lands of others, basing its right so to do on the claim that the lands are batture; when state authorities have taken no official action and made no minute entry towards exercising the servitude against the lands or the timber, and have taken no steps at all to that end beyond giving written notice to the land owners (but not to appellee) four months after confiscation had begun and one month after the destruction of appellee's timber had been completed?"

* The decision of the Court of Appeals had not been reported as of the time of the printing of this brief.

STATUTES INVOLVED

The pertinent portions of the Flood Control Act of May 15, 1928, as amended, 33 USC, Secs. 702a (12), 702b and 702c, Act 188 of 1904 of the Louisiana Legislature, Article 16, Sections 5 and 6 of the Louisiana Constitution of 1921, and Articles 455 and 665 of the Louisiana Civil Code of 1870 are printed as an appendix, infra, pps. 24-27.

STATEMENT

The General Box Company instituted these two suits in the United States District Court for the Western District of Louisiana, invoking the jurisdiction of that Court under the provisions of the Tucker Act, 28 USC Sections 1346 and 1402, to recover the value of timber destroyed on two tracts of land by contractors of the United States in the enlargement of an existing levee on the main stem of the Mississippi River in Louisiana. The sum of $9,000 was demanded in each case. A total of 260 acres of timber on land lying between the old levee and the river was damaged or destroyed. The cases were consolidated for trial and there was judgment for plaintiffs and against the United States for $10,801 with interest at 4% from its entry. From that judgment the United States appealed to the United States Court of Appeals for the Fifth Circuit. The General Box Company appealed from that part of the judgment allowing it interest from date of judgment instead of from date of injury and from that part of the judgment allowing it interest at four instead of five per cent. The Court of Appeals for the Fifth Circuit, Cameron, Circuit Judge dissenting, reversed the judgment of the Trial Court in favor of General Box Company and rendered judgment in favor of the United States. The material facts out of which this controversy arose are as follows:

The General Box Company acquired this timber through deeds properly recorded before the government or Levee Board took any action toward the enlargement of the levee or the destruction of the timber. Under the provisions of Act 188 of 1904, Louisiana Revised Statutes 9:1103 infra, p. 25, standing timber in Louisiana is classified as an immoval' and is subject to all laws of the State on the subject of immovables, even when separated in ownership from the land on which it stands.

The river enlargement project was undertaken pursuant to the provisions of the Federal Flood Control Act of May 15, 1928, 45 Stat. 535, as amended, 33 USC, Secs. 702 a, et seq. which obligated the Levee Board, among other things to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River."

Under Article 16, Section 5 of the 1921 Louisiana Constitution, infra, p. 26, the Board of Commissioners of Levee Districts are authorized to cooperate with the Federal Government in the construction of levees. By resolutions adopted in 1928 and 1929 the Board of Commissioners of the Fifth Louisiana Levee District, which is the Board here involved, agreed to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River." (Exhibits G-1, G-2) These two resolutions had no reference to any particular land but served merely to pledge to the United States Government that the Levee Board would carry out its obligations under the Flood Control Act.

With respect to this particular project and this lawsuit the following occurred:

On May 19, 1947, the Army Engineers wrote the President of the Levee Board as follows, (R. 328; Exhibit G-3):

> "We are in receipt of a letter from Colonel John R. Hardin, District Engineer, New Orleans District, U. S. Engineers, dated May 9 together with project plans of the proposed enlargement of the Brabston and Ashland Levees south of Vidalia, Louisiana.
>
> "We have examined these plans and it is recommended that your Board concur with Colonel Hardin in enlarging these two low sections of levee in accordance with plans, provided that provisions are made for draining existing gravel road on crown of old levee."

and on June 10th of the same year, the Engineers enclosed plans of the proposed enlargement and requested that "this District be furnished with a formal statement by your Board that the rights of way are available for the construction of the enlargement and granting the United States a right of entry to prosecute the work." It was said that the "statement may be in the form of a letter signed by the president of the Board." (R. 328; Exhibit G-4)

On June 12, 1947, the president of the Levee Board replied to this letter as follows, (R. 329; Exhibit G-5):

> "This is to acknowledge receipt of your letter of June 10th, with the enclosed drawings for Item M-343-R, A-E, Brabston Levee Enlargement and Item M-337-R, A-F, Ashland Levee Enlargement and requesting that you be furnished the formal statement by this Board that rights-

of-way are available for the construction and enlargement and granting the United States a right of entry to prosecute the work.

"The Board of Commissioners of the Fifth Louisiana Levee District hereby is glad to comply with your request and render you any assistance possible.".

The President of the Levee Board purportedly acted under a resolution passed by the Board on September 12, 1945, some two years prior to the beginning of the work in this case, which reads as follows, (R-329; G-6):

"Due to the fact that in emergency levee work delays are at times caused by the necessity of waiting for rights-of-ways until the next regular Board Meeting, Commissioner Yerger offered the motion, seconded by Commissioner Guenard, and unanimously approved, that the President of the Board, Mr. A. T. Shields, be and he is hereby authorized and empowered on behalf of the Board of Commissioners, Fifth Louisiana Levee District, to grant rights of way where the need is immediate, the proper right-of-way resolutions to be passed in the regular manner at the following Board meeting."

The record does not show that the Levee Board thereafter ever passed a right-of-way resolution. It was shown by an extract from the minutes of a meeting of the Board held on July 9, 1947, that the only action taken with respect to the President's letter was the following, (R. 330; Exhibit G-7):

"A letter dated June 10, 1947 was read to the Board from Lt. Colonel Alvin R. Moore, Executive Officer of the New Orleans District, requesting a formal statement from this Board that rights-of-way are available for the

construction of the Brabston Levee Enlargement, Item M-343-D, A-E, and the Ashland Levee Enlargement, Item M-337-R. This request was complied with by a letter signed by the President of this Board and dated June 12, 1947, which letter was read to the Board."

This minute entry does not purport to show that emergency action was required, does not apply to plaintiff's property, does not set up any machinery for exercising an appropriation, or provide for notice to any property owner.

On July 15, 1947, the Engineers wrote the Board that instructions to begin the work had been issued July 10th. The work was begun on one tract on July 22nd and on the other on August 11th. (Exhibit G-8; R. 279-280)

Under Article 16, Section 6 of the Louisiana Constitution of 1921, infra, page 26, payment is authorized not to exceed the assessed value in the preceding year for lands and improvements, other than batture, taken or destroyed for levee purposes. In order to comply with this provision, the Board requested from the Assessor a list of property owners within the area on June 20, 1947, (G-10). No reply was received, and on July 18, approximately a month later, a second letter was sent to the Assessor reminding him that he had not replied to the first, (G-11). Finally, by letter dated July 31, 1947, the list was furnished, (G-12). Plaintiff was not included on the list for the reason that the title to the timber was not separated from the title to the land until the latter part of 1946 when the assessment rolls had already been made up, and both land and timber had been assessed to the owner of the fee without separate assessment of the timber. The owner of the fee in the two tracts involved, were on the

assessment list and were notified of the levee enlargement, (R-332, 333; Exhibit G-14).

The notices, however, were not sent out until October 10th, several weeks after the destruction of the timber had been completed. The notice read in part as follows, (Exhibit G-11):

> "We respectfully request that any buildings, timber or other obstac s which might be within the rights of way be removed prior to the time that the contractor begins work."

The letter referred to the fact that the President of the Board was advised that its inspector had previously notified some of the parties. No notice at all had been given to petitioner. The belated suggestion that timber could be removed by the owner was not only untimely as shown, but it was impossible in view of the provisions contained in the construction contracts hereafter discussed.

The General Box Company having received no notice whatever, as shown, learned of the project before the notices were sent out after the destruction of its timber had begun. The work had commenced on one of plaintiff's tracts on July 27, 1947 and on the other August 11, 1947, (R. 279-280). The destruction was by private contractors employed by the United States. When the contractors were asked by the General Box Company to discontinue and allow the company to cut the timber which remained, the request was refused because the contracts had been let by specific specifications on the basis of bulldozing the standing timber, (Exhibit P 6-7). The contractors refused to cease the destruction of the remainder and permit the General Box Company to go ahead

of the bulldozers and remove its timber because their contract gave them the right to remove and destroy the timber. The United States benefitted financially from such destruction, as it was shown that **this was a less expensive method than removing stumps which salvaging operations would leave,** (R. 261, 264, 286). Admittedly, that was the only reason the plans of the Government so provided; there is no claim that the method had any peculiar relation to "levee purposes" or flood control in any sense. The area upon which the timber was growing was between the levee and the river. The Government required a place between the levee and the river to obtain dirt for the enlargement. The trees were destroyed and removed for the purpose of creating an area from which the dirt could be obtained. The timber was not used in any way whatever in carrying out the levee enlargement.

The General Box Company instituted these actions against the United States to recover the full value of the timber destroyed by the Government contractors. The United States filed a third party complaint bringing the Levee Board in as a defendant, (R. 64-67; 96-99). It also moved to dismiss the complaints as not stating claims upon which relief could be granted, but this was denied, (R. 55, 60, 94; 94 FS 441).

Following a trial, the District Court held that the United States was liable for the full value of the timber, but could recover over against the Levee Board (R. 318-337; 107 FS 981). On motions for a new trial by the United States and the Levee Board (R. 337-338), further proceedings were had after which the Court held that there had been no effective appropriation by either the Government or the Levee Board; that the Levee Board should have acted at least through a resolution, with notice to all record owners so as to give them

an opportunity to be heard and enter into negotiations for an opportunity to salvage their property; that the destruction of the timber was by the United States through its contractor, thereby creating in the absence of acquisition of the legal right to do so the implied obligation to pay for what it took and destroyed. The trial Court, accordingly, dismissed the suits as to the Levee Board and entered judgment against the United States for the full value of the timber in the sum of Ten Thousand Eight Hundred One Dollars ($10,801), (R. 352, 353). Interest was allowed at four per cent from date of judgment to thirty days after approval of any appropriation act providing for payment. The United States appealed to the Court of Appeals for the Fifth Circuit. The General Box Company appealed from that part of the judgment allowing interest from date of judgment instead of from date of the taking, and from that part of the judgment fixing interest at four per cent instead of five per cent.

The Court of Appeals in an opinion rendered on June 17, 1955 ___ F. 2d ___,* Circuit Judge Cameron dissenting, held that the United States was not liable because it received the right-of-way from the Levee Board which correctly appropriated it without compensation under a riparian servitude; that the United States was not liable under State law because State law does not apply to it; that it was not liable under Federal law because it succeeded to the rights of the State, and if no compensation was due from the State none was due from the United States, which acts in the place of and for the State; that since the timber had already been taken by the Levee Board under its right of appropriation, the United States could not be said to have taken it from the plaintiff under an

* The decision of the Court of Appeals had not been reported as of the time of the printing of this brief.

implied promise to pay for it. (R. 367-394). The General Box Company timely filed an application for rehearing (R. 396-404) which was denied on August 5, 1955, (R. 405).

The present writ is being sought on the ground that the decision of the Court of Appeals is in conflict with the applicable law of the State of Louisiana, and that the Federal questions involved in the case under the Fifth and Fourteenth Amendments have been decided in a way which are in conflict with applicable decisions of the United States Supreme Court.

ARGUMENT

I

THE COURT OF APPEALS' OPINION IS IN CONFLICT WITH THE APPLICABLE LAW OF THE STATE OF LOUISIANA

It must be conceded that under the civil law of Louisiana property bordering upon a navigable stream is subject to a riparian servitude for levee purposes under Articles 455 and 665 of the Louisiana Revised Civil Code, and that there is no formal procedure prescribed which levee districts must follow in order to appropriate such property where this servitude is otherwise properly exercised. *Danziger v. U. S.*, 93 Fed. Supp. 70 (Eastern District of Louisiana, 1950). However, the servitude for making and repairing levees established by Articles 455 and 665 is limited by the reasonableness of its use, and when that limit is exceeded and oppression and injustice to the property owner is shown, the Courts will review such action. *Pruyn v. Nelson Bros.*, 180 La. 760, 157 So. 585 (1934).

The principal ground upon which the Court of Appeals based its opinion was that the Levee Board correctly followed the requirements of Louisiana law in exercising its right of appropriation, and thus the United States could not be said to have taken the plaintiff's property under an implied promise to pay for it. The Court was of the opinion that no notice was necessary in the appropriation of a right of way for a levee and also, that notice was given to all persons shown by the tax assessor's rolls to be the owners.

The majority opinion in this case was erroneous in its conclusion that under the law of Louisiana servitudes for levee purposes may be exercised without notice to the property owners. An analysis of the authorities cited by the majority opinion, show that none of them sustains the proposition that no notice is required, and that, although no formal procedure is prescribed for exercising the right of appropriation, as is required under an expropriation, no greater sacrifice of private rights may be made than the public welfare demands, and the power to appropriate cannot be arbitrarily or capriciously exercised.

The first case cited by the Court in support of the proposition that no notice is required is *Danziger v. U. S.*, 93 Fed. Supp. 70. In that case while the Court said "there is no formal procedure which levee districts must follow in appropriating property" in the exercise of the servitude, the Court did not hold that no procedure and no notice of any kind was required. **Actually in that case the Board of Commissioners passed a resolution to appropriate the specific property involved and notices were sent out by registered mail to all property owners** of the fact that the land in question had been

appropriated for levee purposes, and **the Levee Board actually set about the business of physically removing all improvements at its expense.** It was only after these steps were taken that the United States called for sealed bids and made an award of the contract.

In the present case the petitioner was not notified and did not learn of the work until after the destruction of its timber had begun by the Government contractors under plans and specifications prepared by the Government prior to any action by the Levee Board, and under plans and specifications which specifically authorized destruction of the timber solely because the United States benefited financially from such destruction. Petitioner was not even permitted by the contractor to cut and salvage the timber after this discovery was made.

The next case cited by the majority opinion was *Dickson v. Board of Commissioners*, 210 La. 121, 26 So. (2d) 474, which did not deal with the question of the notice, or the proper procedure to follow in effecting an appropriation. However, the Court did point out that the actions of levee boards are subject to review in cases of palpable abuse of their powers.

In *Board of Commissioners v. Trouille*, 31 So. (2d) 799, which is also relied on in the majority opinion, the appropriation was carried out under an act of the Louisiana legislature which required that before a right-of-way was appropriated "the exact location thereof shall be determined and made to appear by a proces verbal prepared by the Board of State Engineers of the State of Louisiana and filed in the conveyance records." The Court held that there had been a substan-

tial compliance with the provisions of the act with respect to the notice required.

Petitioner respectfully shows that there is no authority for the conclusion of the Court below that this servitude can be exercised against the property of a citizen without notice, and certainly, there is no authority for the exercise of such a servitude without any action whatsoever by the Levee Board.

The Louisiana courts, to the contrary, have held that the power conferred is not arbitrary and that a citizen has a judicial remedy where oppression or injustice is shown.

In *Peart v. Meeker*, 45 La. Ann. 421, 12 So. 490, the Supreme Court of Louisiana said the following:

> "It is undoubtedly the duty of the public officers charged by the State with the execution of its police power to make no greater sacrifice of private rights than public welfare demands. In several cases this court has said the power so conferred is not arbitrary, and that the citizen is not without proper remedy to subject it to judicial control in proper cases."

In *Pruyn v. Nelson*, 180 La. 760, 157 So. 585, the Louisiana Supreme Court said:

> "This servitude is limited only by the reasonableness of its use, and the administrative officers of the State of Louisiana are charged with determining that limit, subject to review by the courts only when oppression or injustice is shown and proved."

See also *DuBose v. Levee Commissioners*, 7 La. Ann. 165; *Egan v. Hart*, 45 La. Ann. 1358; *Wolfe v. Hurley*, 46 Fed. (2d) 515.

The majority of the Court was also of the opinion that notice had been given to all persons shown by the assessment rolls to be owners and that under the settled jurisprudence of Louisiana no compensation was due for the exercise of the servitude, (1) if the land is batture, Art. 16, Sec. 6, Louisiana Constitution forbids payment for batture used or destroyed for levee purposes, and (2) if it is not batture, the same article restricts compensation to properties which have been assessed.

However, the purported notice to which the majority opinion refers, was a notice given by the President of the Levee Board dated October 10, 1947, approximately three months after the work commenced and several weeks after petitioner's timber had been destroyed. It is thus difficult to see how any such notice can be relied upon, particularly in view of the fact that plaintiff was the record owner of the timber and the fact of its assessment or non-assessment is immaterial as will be hereinafter shown.

It is conceded that the land upon which the timber stood should be classified as batture, but Section 6 of Article 16 of the Louisiana Constitution of 1921, which forbids payment for batture used or destroyed for levee purposes, is manifestly not applicable, as this article insofar as it applies to batture, as well as non-batture lands subject to the servitude, only applies where the destruction is for levee purposes, and not merely to save money, and in any event, under this article, arbitrary and capricious action is prohibited, and the land owner has

redress where oppression and injustice is shown. In respect to these principles there is no distinction between batture subject to the riparian servitude and non-batture subject to the riparian servitude. The rule as to no payment in the one case and a payment of assessed value in the other case only applies where the riparian servitude is being exercised for levee purposes, or in any event, only where the servitude is reasonably and properly exercised. For these reasons it is immaterial as to whether or not the property be classified as batture, and the issue of assessment or non-assessment raised by the majority opinion is likewise immaterial.

The majority opinion apparently proceeds on the assumption that the owner of batture has no property right of any kind in such ownership entitling him to any protection even as against willful confiscation and unnecessary destruction of his interest therein. The correct position as to this is fully developed in the dissenting opinion of Judge Cameron from which the following is quoted:

> "It is difficult to understand the position of the majority in holding that the United States had the right to make this assault upon the property of appellee without affording appellee the slightest chance to protect itself, indeed, while forbidding appellee to undertake such self-protection. It is not sufficient to say that appellee bought the timber knowing that it was subject to the exercise of servitude. The majority refers to the rights of such a property owner as if they were possessed of no substance at all. Here is the way the court below describes the kind of property right appellee had in its timber:
>
> > " 'Notwithstanding the servitude of the civil law, just mentioned, lands fronting on a navigable stream and

> everything on them having value as property belongs to the riparian owner, down to the mean low water line. L.S.A.-C.C. Articles 455, 457, and may be used, bought and sold even after the construction of levees, the same as any other private property. Timber, oil, gas and other minerals may be taken therefrom by the owner, subject, of course, to the right of the state to insist that levees, public roads, etc., shall not be interefered with or damaged.'
>
> "What then, are the rights of the owner of such private property if it be timber, oil, or similar property? If appellee had erected oil derricks under a proper lease, or had constructed oil storage tanks, would it be held that the State of Louisiana or the United States could destroy or confiscate that property without notice or without giving the owner a chance to salvage it? If dwelling houses or places of business such as wharves were used in the legitimate enjoyment of such property rights, could they be similarly destroyed or confiscated? Is timber any different from oil derricks, storage tanks and structures?"

This statement as to the property rights of an owner of batture is fully supported by all of the Louisiana cases, summed up in an excerpt which we quote from found in *Seibert v. Conservation Commission of Louisiana*, 159 So. 375, in which the Supreme Court of Louisiana said the following:

> "It is the well-settled jurisprudence of this state that the contiguous riparian proprietor owns the banks of the river attached to his property, and this includes the alluvion or batture, and that the banks or rivers and/or streams is the land between the ordinary high-water mark and the ordinary low-water mark. What is the ordinary low-water mark of the Mississippi River? The levee of the Mississippi River, by statute, is designated

as the ordinary high-water mark. State v. Richardson, 140 La. 329, 72 So. 984; Wemple v. Eastham, et al., 150 La. 247, 90 So. 637; Pizanie v. Gauthreaux, 173 La. 737, 138 So. 650; Smith v. Dixie Oil Co., 156 La. 691, 101 So. 24; Boyce Cottonseed Oil Manufacturing Co. v. Board of Commissioners, 160 La. 727, 107 So. 506."

In view of the foregoing, it is respectfully submitted that the Court of Appeals erred in its application of the law of the State of Louisiana to the facts of this case; that the Levee Board did not properly exercise its right of appropriation; that, therefore, the Government could not derive any rights from the Levee Board upon which it can rely; and, that, the destruction of plaintiff's timber by Government Contractors, pursuant to the plans and specifications prepared by the Government Engineers, and without notice to plaintiff, and without affording to plaintiff an opportunity to salvage the timber, created an implied promise under the Fifth Amendment to pay for the timber so destroyed.

II

THE COURT OF APPEALS DECIDED THE FEDERAL QUESTION INVOLVED IN THIS CASE IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

Circuit Justice Cameron in his dissenting opinion very forcefully and eloquently stated the reasons why the action taken by the Government were contrary to the requirements of the Fifth Amendment. Petitioner quotes the following from his opinion and adopts it as its argument:

"It is clear that the court below felt that the actions taken by appellant were repugnant to the just compen-

sation and due process clause of the Fifth Amendment of the Constitution, and no one would question that the United States was fettered at every stage of the proceedings by their terms. In dealing with the property of its citizens, the great and powerful government should keep its action above suspicion of unconstitutionality and as as far as possible away from the border line of such a charge.[20]

"We need not pause to discuss the requirements of the Fifth Amendment that the United States is not permitted to take private property for public use without just compensation beyond observing that it hardly seems fair that the salutary provisions of the Amendment should be nullified by the indirect method of taking provided for in the amended Flood Control Act.[21] We pass up further discussion of that clause because it seems so clear that the action of the Government cannot be squared with the due process provisions.

"The Government sent its contractors onto this land and began destroying wealth in a manner which can be characterized as nothing but reckless, whether practiced by an individual or by the sovereignty. The trees it set about destroying had economic values which should have been conserved under the most rudimentary concepts of what is fair and right and consistent with husbandry.

"[20] Mr. Justice Holmes well expressed the idea in *Federal Trade Commission v. American Tobacco Co.*, 1924, 264 U.S. 298, 307: 'We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law'."

"[21] It is worthy of note that the Amended Act, 33 U.S.C.A. Cumulative Supplement, 702-a-12 provides for reimbursement by the United States of local authorities of reasonable expenditures under local laws and customs; and the government engineer testified that 'since 1941 the Federal Government has been paying a fair market value for lands used or destroyed in the carrying out of flood control plans.'"

"The most superficial inquiry would have revealed the owner of this timber because the deeds were of record. The government had taken initial steps to begin the prosecution of this work four months before the date of actual beginning. The only precaution it had taken was to write a letter to the Levee Board requesting that it be 'furnished a formal statement by your board that rights-of-way are available for the construction of the enlargement.' If the investigation had been pursued, the government would have found that the Levee Board had not taken any steps or made any minute entries relating to these particular lands or this timber, had not made the first move towards a formal expropriation of the rights of way or the timber on them, and had not notified the property owners that any expropriation was in contemplation, or that any entry upon their lands would ensue.

"The simplest dictates of fairness would have required, in any event, that the Government give the property owners the opportunity to remove things of value from the right of way before their destruction should be begun. If the government had the right to begin destroying timber without notice, it would have had the like right to turn waters upon the lands of these owners without affording opportunity to remove livestock. Whatever muniments of title the Government may have had to the right of way, and whatever assurances it may have possessed with respect to right of entry upon the lands, it had no right whatever to make its entry in such a harsh and ruthless way and with such a wanton disregard of all of the dictates of justice and humanity.

"The foregoing considerations are based upon the assumption that the destruction of the trees was inadvertent and innocent. The fact is, however, as conceded by the government, that the destruction was deliberate and was planned from the outset, and such planned de-

struction was disclosed to the Levee Board when the government engineers forwarded to that Board a set of the plans on May 19th.

"The Government could save money by permitting the contractor to push whole trees off of the land it was clearing so that dirt might be obtained for levee purposes, instead of permitting appellee to fell and remove the timber, leaving the stumps to be removed by the contractor. 'This was a substantially less expensive method than removing the stumps which appellee's salvaging operation would leave.'[22] That statement from the government's brief, followed by the assertion 'It was pushed over, and thus destroyed, by bulldozers because the contractors' bid was substantially reduced "on the basis of that method or removing the timber" ', leaves no room to doubt that the Government made its plans and let its contracts on the basis of the destruction; and that is verified by the refusal of the contractors to comply with appellee's request, made as soon as he discovered the depredations, that he be permitted to cut the timber which remained in front of the bulldozers.[23]

"But such a course is forbidden by the due process clause of the Fifth Amendment, and what the courts have said in defining its scope and application. Mr. Justice Lamar, speaking for the Supreme Court in a case involving a forced track connection by a railroad,[24] laid down the rule that such an order could not be sustained, 'merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable * * *'; and held further that the railroad must not be denied the right to show that

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"[22] See statement from government brief, Note 2, *supra*."

"[23] Ib.".

"[24] *Washington, ex rel v. Fairchild, et al*, 224 U.S. 510, 524."

'the order was so arbitrary, unjust or unreasonable as to amount to deprivation of property * * *'. And the Supreme Court also held[25] that the Fourteenth Amendment 'is concerned with the substance and not with the forms of procedure'.

"Mr. Justice Brandeis, in his concurring opinion in the *St. Joseph Stockyards* case,[26] first used the term 'inexorable safeguard' in holding that no step in a proceeding affecting the rights of a citizen shall be taken 'except upon due notice and opportunity to be heard'. Mr. Justice Cardozo[27] defined due process as 'the protection of the individual against arbitrary action', and repeated again that its essence was the observance of 'the rudiments of fair play'.

"That decision was cited by us in our recent case of *City of Meridian v. Mississippi Valley Gas Co.*,[28] a case in which we affirmed the action of the lower court in restraining the enforcement of a city ordinance passed without constitutionally adequate notice. We also cited the case of *Morgan v. United States* in which the Supreme Court twice[29] reversed administrative proceedings for failure to observe the 'fundamental requirements of fairness which are of the essence of due process'.

"And we have recently, in *Arndt v. United States*,[30] held that government officials must conform their actions to accepted standards of fair play whether those standards are set forth in statutes or regulations or derived from

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"[25] Missouri, ex rel v. North, et al, 271 U.S. 40, 42."
"[26] St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 73."
"[27] Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, 302."
"[28] 214 F.2d 525, 526 (1954)."
"[29] 298 U.S. 468 and 304 U.S. 1."
"[30] 22 F.2d 484."

the common acceptation of what is fair in dealings between man and man.

"What the government did in the present case is at war with all of those concepts and ought to be rejected by us, whether we base the rejection on the failure of the Levee Board to observe Louisiana law or upon the higher ground of failure of the United States to observe common standards of justice and fair play. I do not think this court should give its support to such wanton, unjust and unconstitutional actions. I think the judgment of the District Court was right and should be affirmed."

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the decision of the Court of Appeals is manifestly erroneous. The issues here presented involve important questions of federal and state law, concerning interests in timber lands along the Mississippi River in Louisiana and other navigable streams of the State of a value of many millions, and this Honorable Court should exercise its discretionary powers to correct the errors herein complained of and reinstate the judgment of the District Court. The petition for certiorari should, therefore, be granted.

Respectfully submitted,

FRED G. BENTON,
Baton Rouge, La.

CARL C. CHADWICK,
Natchez, Miss.

BARNETT, JONES & MONTGOMERY,
Jackson, Miss.

By _____
Fred G. Benton

APPENDIX

The pertinent portions of Section 3 of the Flood Control Act of May 15, 1928, as amended, 33 U.S.C., are contained in Sections 702a-(12), 702b and 702c, as follows:

"§ 702a-12. Same; modified Lower Mississippi River Project as of August 18, 1941 . . . .

"(d) The Chief of Engineers with approval of the Secretary of the Army, shall reimburse local authorities for actual expenditures found by the Chief of Engineers to be reasonable, for providing at the request of the United States, in accordance with local legal procedure or custom, rights-of-way and flowage easements required for future setbacks of main-line Mississippi River levees. . . ."

"§ 702b. Same; local contribution toward cost of flood control work . . . in view of the great expenditure estimated at approximately $292,000,000, prior to May 15, 1928, made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that River; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required. (May 15, 1928, c 569, § 2, 45 Stat. 535)."

"§ 702c. Same; expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights. Except when

authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of the Army that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes."

Act 188 of 1904 of the Louisiana Legislature is as follows:

"Providing that standing timber shall remain an immovable, even when separated in ownership from the land on which it stands.

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That standing timber shall remain an immovable, and be subject to all the laws of the State on the subject of immovables, even when separated in ownership from the land on which it stands, provided that nothing in this act shall be construed as altering, affecting or modifying existing laws relative to the assessment and taxation of such timber.

"Section 2. Be it further enacted, etc., That all laws or parts of laws in conflict with this act be, and the same are hereby repealed."

Article 16, Sections 5 and 6 of the 1921 Louisiana Constitution are as follows:

"§ 5. Cooperation with Federal Government.—All governing authorities of districts which have been, or may be created, are authorized to cooperate with the Federal Government in the construction and maintenance of the levees in this State, on such terms and conditions as may be provided by the Federal authorities and accepted by the State authorities."

"§ 6. Compensation for property used or destroyed for levee purposes — Tax levy. — Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes, and for acquiring property within the limits of any duly incorporated municipality of one hundred thousand population or over to be used for constructing new streets or highways where it was necessary to take a previously existing street or highway for levees or levee drainage purposes, shall be paid for at a price not to exceed the assessed value for the preceding year; provided that this shall not apply to batture, nor to property the control of which is vested in the state or any subdivision thereof for the purpose of commerce; and provided, further, that streets and highways within the limits of any duly incorporated municipality of one hundred thousand population or over shall be restored by the governing authorities of the levee district upon the new location so acquired in order to replace any street or highway actually used or destroyed for levees or levee drainage purposes, and such street or highway shall be of a similar type or character as that of the street or highway used or destroyed.

"If the district has no other funds or resources out of which such payment can be made, it may levy, on all taxable property situated therein, a tax sufficient to pay for

said property so taken, and for such streets and highways so relocated and restored, within the limits of any municipality of one hundred thousand population or over not to exceed one-fourth of one mill on the dollar, to be used solely in the district where collected. This shall not prevent the appropriation of said property before payment. [As amended, Acts 1928, No. 165, § 1, adopted, November 6, 1928.]".

Article 455 of the Louisiana Civil Code reads as follows:

"Art. 455. Public things; use of river banks. The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.

"Nevertheless, the ownership of the river banks belongs to those who possess the adjacent lands."

Article 665 of the Louisiana Civil Code reads as follows:

"Art. 665. Legal public servitudes. Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.

"All that relates to this kind of servitude is determined by laws or particular regulations."

CERTIFICATE

I, Fred G. Benton, hereby certify that a copy of this petition has been mailed to Solicitor General, Department of Justice, Washington 25, D. C., Perry W. Morton, Assistant Attorney General, T. Fitzhugh Wilson, United States Attorney, Shreveport, Louisiana, and to Roger P. Marquis and S. Billingsley Hill, Attorneys, Department of Justice, Washington, D. C., by first class mail, postage prepaid, this _____ day of _____, 1955.

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Fred G. Benton